SURUHANJAYA SEKURITI v. RBTR ASSET MANAGEMENT BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: WA22NCC-103-01-2013]
4 MARCH 2022

Abstract – *In a case where the board member of an asset management company had no knowledge that funds were being embezzled, and there is no express provision in the Licensing Handbook or in the Fund Manager Guidelines that required him to report any breach of investment terms or contravention of relevant statutory obligations to Securities Commission, to order restitution against him would neither be fair nor just, and would not constitute proper exercise of judicial discretion under s. 360 of the Capital Markets and Services Act 2007.*

SECURITIES: *Securities Commission – Recovery of money lost by investors – Whether s. 200 of Capital Markets and Services Act 2007 permits Commission to commence representative action for negligence on behalf of investors – Claim for relief against third defendant – Whether there was breach of statutory duty – Whether third defendant liable for dissipation of funds – Whether third defendant required to report breach of investment terms or contravention of relevant statutory obligations to Securities Commission – Whether cause of action for negligence maintainable against third defendant – Whether fair and just to order restitution against third defendant – Whether constituted proper exercise of judicial discretion under s. 360 of Capital Markets and Services Act 2007*

The plaintiff, the regulator of the capital markets in Malaysia known as Securities Commission ('Commission'), commenced a civil action against the defendants pursuant to ss. 200 and 360 of the Capital Markets and Services Act 2007 ('CMSA') seeking, among others, to recover money lost by investors in a scheme that was promoted by the first defendant and the fourth to eighth defendants. After a full trial of the action, the court allowed the Commission's claims for relief against the first, fourth, fifth, sixth, seventh and eighth defendants but dismissed the claim against the third defendant ('Mr Khoo'), against which the decision the Commissioner appealed. The Commission's case was that the fourth defendant, Locke Guaranty Trust (NZ) Limited ('Locke Guaranty Trust') was set up in New Zealand by Issac Paul Ratnam, Nicholas Chan and Joseph Lee (the sixth to eighth defendants) to offer an investment product called Locke Secured Capital Plan to investors in Malaysia. In August 2007, Isaac Ratnam met with the second defendant, Al Alim Mohd Ibrahim ('En Al Alim'), who was the managing director of RBTR Asset Management Berhad ('RBTR') and the holder of a fund manager's representative licence. RBTR was the holder of the fund manager's

licence, which permitted it to make investments in securities on behalf of its clients. Pursuant to this meeting, RBTR and Locke Guaranty Trust entered into a joint asset management agreement, by the terms of which RBTR would offer the investment product of Locke Guaranty Trust to the Malaysian investing public. RBTR began to advertise and solicit funds from the Malaysian investing public for a product known as the Euro Deposit Investment Scheme ('EDI scheme'). Among the terms of this scheme was that there would be full capital protection, and that the clients' funds would be invested by RBTR with Lichtenstein Landesbank, which was a AAA-rated European bank. In January 2008, the accounts were frozen by the Principality of Lichtenstein for suspected money laundering. The Commission's case was that Locke Guaranty Trust did not inform RBTR about the freeze, but induced RBTR to place the funds with another bank, EFG Bank SA Zurich, under the pretext of diversifying its investments. Subsequently, Locke Guaranty Trust made the unilateral decision to transfer the investors' funds from EFG Bank to Locke Capital Investments (BVI) Ltd, the fifth defendant, to be held in an account in Barclays Bank in Singapore. This was a material change, because the terms of the original investment required the funds to be placed at a AAA-rated bank, which Barclays Bank was not. The joint asset management agreement between RBTR and Locke Guaranty Trust was then amended, principally to substitute Locke Guaranty Trust with Locke Capital Investments, and Lichtenstein Landesbank with Barclays Bank. By the end of May 2008, more than RM27 million of investors' funds had been remitted into Locke Capital Investments' account held at Barclays Bank. UBB (Malaysia) Trustee Berhad, the custodian appointed in respect of the EDI scheme, raised concerns about the investments as not only was the investment not held in the name of the custodian, it was not even in the name of RBTR as the licensed fund manager. It was held by Locke Capital Investments, an unlicensed company incorporated in the British Virgin Islands. A board meeting of RBTR was convened, and the third defendant ('Mr Khoo') was present at this meeting. From the evidence, Mr Khoo had not been involved in the setting up of the EDI scheme or in negotiations between RBTR and Isaac Ratnam. The board was informed that Locke Guaranty Trust had not fulfilled its representations, that the banks to whom the money had transferred had not provided confirmation to the custodian regarding receipt of the investment funds and that the joint asset management agreement had been signed without proper resolutions being passed. The minutes of the subsequent board meeting recorded that En Al Alim informed the board of his decision to retire as managing director of RBTR, and the board appointed Mr Khoo to be the joint managing director with En Al Alim for a handover period. En Al Alim, Mr Apparao Apana and Mr Khoo then went to Barclays to check if the EDI scheme investor funds were in fact secured, but their visit did not yield any useful information, apart from a confirmation from Barclays that Locke

Guaranty Trust and entities connected to it maintained an account there. Subsequent investigations by the Securities Commission revealed that some of the EDI scheme funds had been misappropriated. It was also established that the bi-annual returns to investors were in fact funded through the capital invested by subsequent EDI scheme investors – making the whole arrangement a Ponzi scheme. The EDI scheme funds were also invested in leveraged structured products, which were not capital protected investments, contrary to representations given to investors. The pleaded case against Mr Khoo was initially cast widely and alleged that he together with RBTR and En Al Alim had breached their duties in the setting up and marketing of the EDI scheme. According to the plaintiff, Mr Khoo's purported failure to report various breaches regarding the EDI scheme to the Commission in a timely manner contributed to the dissipation of USD1,430,303,82 from the Barclays account between 1 July and 21 November 2008, and sought an order for restitution from the court. The two pleaded causes of action against Mr Khoo were (i) a breach of statutory duty (by reason of the breach of the Licensing Handbook and the Fund Manager Guidelines); and (ii) the common law cause of action for negligence.

Held (no order of restitution against third defendant):

(1) The cause of action for negligence was not maintainable against Mr Khoo. Even if there existed a tortious duty of care that was owed by a financial services representative to the Commission by reason of the proximity of their relationship, there was no loss that was occasioned to the Commission by reason of breach of such duty. To succeed in a common law claim for negligence, the Commission must prove its loss. The losses in this case were that of the investors. While s. 200 permits the Commission to institute civil proceedings to disgorge gains, this provision only applies in respect of contraventions of ss. 175, 176, 177, 178, 179 and 181 of the CMSA. Section 200 does not permit the Commission to commence a representative action for negligence on behalf of investors. The related point was that the investors, to whom a duty of care may conceivably be owed by Mr Khoo, and who had suffered the losses claimed, were not the plaintiffs in the present case. (para 10)

(2) As at the date of 29 May 2008 board meeting, Mr Khoo was not yet the holder of a fund manager's representative licence. He would not have been subject to the requirements of the Licensing Handbook or the Fund Manager Guidelines, save in his capacity as a board member of RBTR. Mr Khoo had no knowledge that funds had been or was being embezzled by the sixth to eighth defendants, or of the Ponzi scheme that was being conducted. These facts only came to be established later, after the investigations were carried out by the Commission. While it was true that the board of RBTR (including Mr Khoo) had concerns on whether

A or not the EDI scheme funds were secured, this was because there was no confirmation forthcoming from Barclays that the investments were capital protected and backed by an AAA-rated bank. This court accepted Mr Khoo's testimony that he had discussed the subject of referring the non-compliance to the Securities Commission with En Al Alim, and that
B En Al Alim had told him that if they did that, the whole of the EDI scheme funds might be lost. Mr Khoo's testimony was consistent with that of Mr Apparao Apana, a board member of RBTR, who testified that he had suggested that they take legal action to recover the EDI scheme funds. Instead, the approach was taken to work with Locke Guaranty
C Trust/Locke Capital Investments to secure the return of the funds that were maturing. They could not be faulted for having taken this decision. This approach was taken with the genuine and honest belief that it was in the best interests of the EDI scheme investors to do so. The board of RBTR had been briefed and had been kept abreast of developments regarding efforts to secure the return of the EDI scheme investments. It
D would thus be manifestly unfair to single out Mr Khoo to be liable for the dissipation of the USD1,430,303.82. (paras 50-54)

(3) When it became clear that Locke Capital Investments would only be able to repay the principal for the months of February and March 2009, one year after their original maturity date, Mr Khoo reported the matter
E to the Commission. There was in fact no express provision in the Licensing Handbook or in the Fund Manager Guidelines that required Mr Khoo to report any breach of investment terms or contravention of relevant statutory obligations to the Commission, much less to do so at the earliest available opportunity. The Commission had not sought to
F argue that this was an implied statutory obligation. The absence of such an express statutory duty was fatal to the Commission's case against Mr Khoo. Even if there existed such a duty, and Mr Khoo was in breach of such duty, this court would have declined to exercise its discretion under s. 360(1)(M) of the CMSA to order that he be liable to make
G restitution of the USD1,430,303.82. (paras 57-59)

(4) Mr Khoo's involvement in the EDI scheme came about by virtue of circumstances only, and whose role was to attain a favourable resolution in favour of the EDI scheme investors. His entire life lay in ruins because of his incidental involvement in the wretched affair. Mr Khoo
H had been a banker, having worked with financial institutions over a period of 20 years. Because of the suit having filed against him, he was unable to secure employment in the financial sector. At the time of trial, he was a Grab car driver to sustain a living. Mr Khoo was, for all practical purposes, the whistle-blower in this whole affair. To order
I restitution against him would neither be fair nor just and would not constitute a proper exercise of the judicial discretion under s. 360 of the CMSA. (paras 60-62)

Legislation referred to:
Capital Markets and Services Act 2007, ss. 175, 176, 177, 178, 179, 181, 200, 360(1)(M), (13)(a)(ii)

For the plaintiff - Ganesan Nethi & Daniel Tan; M/s Tommy Thomas
For the 3rd defendant - Jasbeer Singh & Nur Hakimah Mohamad; M/s Jasbeer, Nur & Lee
For the 6th-8th defendants - Joy Appukuttan & Nicholas Ch'ng; M/s Chai & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The plaintiff in this case is the Securities Commission, the regulator of the capital markets in Malaysia. It commenced a civil action against the defendants pursuant to ss. 200 and 360 of the Capital Markets and Services Act 2007 ("CMSA") seeking, among others, to recover money lost by investors in a scheme that was promoted by the first defendant and the fourth to eighth defendants.

[2] After a full trial of the action, I allowed the Commission's claims for relief against the first, fourth, fifth, sixth, seventh and eighth defendants. By the time trial commenced, the second defendant had passed, and the action was discontinued against him. I dismissed the Commission's claim against the third defendant, Mr Valentine Khoo, against which decision the Commission has now appealed. These grounds of judgment set out the reasons for my dismissing the claim against Mr Khoo.

[3] As no other party in the action has appealed, I do not propose to address the claims against the other defendants except to the extent that it may aid in the understanding of the claim against Mr Khoo.

The Causes Of Action Against Mr Khoo

[4] It will be useful at the outset to deal with the pleaded causes of action against Mr Khoo.

[5] Mr Khoo was a director of the first defendant, RBTR Asset Management Berhad ("RBTR"). At the material time, RBTR held a fund manager's licence issued under the CMSA. Mr Khoo also held a fund manager's representative licence for two discrete periods when he was employed by RBTR.

[6] The terms of a licence issued under the CMSA requires a holder to comply with the Licensing Handbook issued by the Securities Commission. In the case of a holder of a fund manager's representative licence, he or she

must also comply with the obligations imposed on fund manager's representatives under the Guidelines on Compliance Function for Fund Managers (the "Fund Manager Guidelines").

[7] Under s. 360 of the CMSA, where a person had contravened a "relevant requirement", the Commission may apply to court for (among others) an order directing the person in breach to make restitution. By s. 360(13)(a)(ii), the expression "relevant requirement" is defined to include a requirement that has been imposed as condition of a licence issued under the CMSA.

[8] It will thus be apparent that the Securities Commission can seek a court order to enforce its Licensing Handbook and the Fund Manager Guidelines, and to this extent, they have the force of law.

[9] The two pleaded causes of action against Mr Khoo were:

(i) breach of statutory duty (by reason of the breach of the Licensing Handbook and the Fund Manager Guidelines, as explained above); and

(ii) the common law cause of action for negligence.

[10] I am of the view that the cause of action for negligence was not maintainable against Mr Khoo, for the following reasons:

(i) even if there existed a tortious duty of care that is owed by a financial services representative to the Securities Commission by reason of the proximity of their relationship (and I would add, without making a definitive determination, that it is doubtful that it was so), there was no loss that was occasioned to the Commission by reason of breach of such duty. To succeed in a common law claim for negligence, the Commission must prove its loss. The losses in this case were that of the investors. While s. 200 permits the Commission to institute civil proceedings to disgorge gains, this provision only applies in respect of contraventions of ss. 175, 176, 177, 178, 179 and 181 of the CMSA. (These are the market misconduct offences). Section 200 does not permit the Commission to commence a representative action for negligence on behalf of investors; and

(ii) the related point was that the investors, to whom a duty of care may conceivably be owed by Mr Khoo and who have suffered the losses claimed, were not plaintiffs in the present case.

[11] The remainder of this judgment will thus address the statutory duties that were said to be owed by Mr Khoo under the Licensing Handbook and the Fund Manager Guidelines.

Material Facts

The Establishment Of Locke Guaranty Trust

[12] The Commission's case was that the fourth defendant, Locke Guaranty Trust (NZ) Limited was set up in New Zealand by Issac Paul Ratnam, Nicholas Chan and Joseph Lee (the sixth to eighth defendants) in early 2007 to offer an investment product called Locke Secured Capital Plan to investors in Malaysia.

[13] Very shortly after, in June 2007, the Securities Commission of New Zealand took regulatory action against Locke Guaranty Trust, which effectively prevented it from advertising its investment product.

The Involvement Of RBTR

[14] In August 2007, Isaac Ratnam met with the second defendant, Al Alim Mohd Ibrahim. At the time, Al Alim was the managing director of RBTR and the holder of a fund manager's representative licence. As explained above, RBTR was the holder of the fund manager's licence, which permitted it to make investments in securities on behalf of its clients.

[15] Pursuant to this meeting, RBTR and Locke Guaranty Trust entered into a Joint Asset Management Agreement, by the terms of which RBTR would offer the investment product of Locke Guaranty Trust to the Malaysian investing public.

[16] In pursuance of the Joint Asset Management Agreement, RBTR began to advertise and solicit funds from the Malaysian investing public for a product known as the Euro Deposit Investment Scheme (the "EDI Scheme"). Among the terms of this scheme was that there would be full capital protection, and that the clients' funds would be invested by RBTR with Lichtenstein Landesbank, which was a AAA-rated European bank.

[17] In January 2008, the accounts were frozen by the Principality of Lichtenstein for suspected money laundering. The Commission's case was that Locke Guaranty Trust did not inform RBTR about the freeze, but induced RBTR to place the funds with another bank, EFG Bank SA Zurich, under the pretext of diversifying its investments.

[18] Subsequently, Locke Guaranty Trust made the unilateral decision to transfer the investors' funds from EFG Bank to Locke Capital Investments (BVI) Ltd (the fifth defendant), to be held in an account in Barclays Bank in Singapore. This was a material change, because the terms of the original investment required the funds to be placed at a AAA-rated bank, which Barclays Bank was not. Furthermore, the funds were now denominated in US dollars rather than Euros, which exposed the investors to a currency risk that they had not contemplated at the time the investments were made.

[19] The Joint Asset Management Agreement between RBTR and Locke Guaranty Trust was then amended, principally to substitute Locke Guaranty Trust with Locke Capital Investments, and Lichtenstein Landesbank with Barclays Bank.

[20] By the end of May 2008, more than RM27 million of investors' funds had been remitted into Locke Capital Investments' account held at Barclays Bank.

Concerns Raised By Custodian

[21] On 28 May 2008, UBB (Malaysia) Trustee Berhad wrote to RBTR raising concerns about the investments. Under the Fund Manager Guidelines, a fund manager cannot directly hold investments for its clients. A custodian must be appointed, in whose name the investments must be held. The reason for this requirement was of course to ensure that the investments are segregated and bankruptcy-remote: in the event of the insolvency of the fund manager, its creditors would not have a claim over investors' moneys. UBB (Malaysia) Trustee Berhad was the custodian appointed in respect of the EDI Scheme. In the present case, not only was the investment not held in the name of the custodian, it was not even in the name of RBTR as the licensed fund manager. It was held by Locke Capital Investments, an unlicensed company incorporated in the British Virgin Islands.

[22] The queries raised by the custodian included the fact that it had not received documentation to the effect that the investments were capital protected and held in an account with a AAA-rated bank.

[23] On 29 May 2008, a board meeting of RBTR was convened, to discuss the EDI Scheme and the concerns that had been raised by the custodian. Mr Khoo was present at this meeting.

Valentine Khoo, The Third Defendant

[24] At this point, it will be convenient to depart from the current narrative, and to describe Mr Khoo's history with RBTR.

[25] Mr Khoo held a fund manager's representative's licence for two distinct periods: from 21 June 2004 to 20 June 2005, and then from 4 July 2008 to 3 July 2010. At the time he attended the 29 May 2008 board meeting of RBTR, he did not hold a representative's licence, although he was a non-executive director. He had left RBTR to join BioX Group as its General Manager, a position which he held between August 2005 to June 2008. He had been a banker prior to 2004.

[26] From the evidence received at trial, it was clear that Mr Khoo had not been involved in the setting up of the EDI Scheme or in negotiations between RBTR and Isaac Ratnam. Mr Khoo's first involvement with the EDI Scheme came when he attended the board meeting of 29 May 2008.

The Board Meeting Of 29 May 2008

[27] The minutes of the board meeting on 29 May 2008 recorded that En Zul Hisham Mohd Yusoff (PW3), a board member representing Bank Rakyat raised questions regarding the EDI Scheme. The board was informed that Locke Guaranty Trust had not fulfilled its representations, and that the banks to whom the money had transferred had not provided confirmation to the custodian regarding receipt of the investment funds. The minutes also recorded that RBTR had received a letter that from Locke Capital Investments informing that it has assigned investment contract notes from Barclays Bank amounting to USD20 million. One of the directors had highlighted the risks involved in such a transaction. It was also noted that the Joint Asset Management Agreement had been signed without proper resolutions being passed.

[28] It was then resolved that a committee be established to provide a status report on the EDI Scheme. This committee would comprise Dato' Shamir Mumar Nandy, Mr Valentine Khoo (the third defendant), Mr Apparao Apana (PW6, who was also a senior lawyer) and En Al Alim.

[29] It was clear from the minutes that members of the board had serious concerns not only about Locke Guaranty Trust and Locke Capital Investments, but also in the way in which En Al Alim had handled matters to date. It was for that reason that a sub-committee of the board was formed, of which Mr Khoo was a member. From the context of the minutes, it was also clear that Mr Khoo's presence was intended to provide an objective viewpoint, one that was independent of En Al Alim.

Mr Khoo's Appointment As Joint MD

[30] The minutes of the subsequent board meeting held on 15 July 2008 recorded that En Al Alim informed the board of his decision to retire as managing director of RBTR, and the board appointed Mr Khoo to be joint managing director with En Al Alim for a handover period.

[31] It was apparent from the minutes, even though it was not expressly set out as such, that the board's faith in En Al Alim quavered at this point, and Mr Khoo services was needed to steady the ship. Mr Khoo had regained his representative's licence about nine days prior, on 4 July 2008.

The Events After First Board Meeting

[32] Reverting to the events occurring immediately after the board meeting of 29 May 2008: a meeting was requested with the representatives of Locke Guaranty Trust. Only Nicholas Chan and Joseph Lee (the seventh and eighth defendants) attended this meeting, which was held at RBTR's premises several days after the board meeting. According to Mr Apparao's testimony at trial, they were evasive and could not provide satisfactory answers. It was

A then that he suggested to Mr Khoo and En Al Alim that they pay a visit to Barclays Bank in Singapore to check if the EDI Scheme investor funds were in fact secure.

[33] On 5 June 2008, the three of them (En Al Alim, Mr Apparao and Mr Khoo) went to Barclays. Their visit did not yield any useful information, B apart from a confirmation from Barclays that Locke Guaranty Trust and entities connected to it maintained an account there. No further information could be revealed on account of banking secrecy.

[34] This stands to reason, for the depositor or customer on record was not C RBTR or even the custodian. The account was held in the name of Locke Capital Investments. As explained, this constituted a breach of the Fund Manager Guidelines.

[35] Upon their return to Kuala Lumpur, the board was briefed. Mr Apparao suggested that legal action be taken against Locke Guaranty Trust D and its representatives to recover the EDI Scheme investor funds, but En Al Alim recommended that RBTR continue to negotiate with them to secure the return of the funds.

[36] Mr Apparao's testimony accorded with the version of events as narrated by Mr Khoo at trial. According to Mr Khoo, he had discussed the E subject of referring the matter to the Securities Commission with En Al Alim, to which En Al Alim replied with words to the effect that if they reported the matter to the Commission, the whole of the EDI Scheme funds might be lost. The approach was thus taken to attempt to negotiate the return of the funds.

F **[37]** At trial, I found Mr Khoo to be a reliable witness who attempted to answer questions as clearly as he could without prevarication, even in circumstances where the answer he gave tended not to be favourable to his position.

G **[38]** As explained above, by mid-July 2008, En Al Alim effectively ceded his position as managing director to Mr Khoo.

Dividend And Principal Payments

[39] Between May 2008 and January 2009, the EDI Scheme investors received their dividend payments and principal repayments. For the return H of capital in January 2009, there was a shortfall of approximately RM128,000 in the capital repayments by Locke Capital Investments, which was made up by RBTR.

[40] However, when the time came for the repayment of principal for the months of February and March 2009, RBTR was informed that the principal I amounts for the EDI Scheme investments could only be repaid one year after their original maturity. It was then that Mr Khoo reported the delay in

principal repayment to the Securities Commission. According to Mr Khoo, he had asked the officers of the Commission to take a closer look at the records and files that were maintained and locked in En Al Alim's office.

Subsequent Investigations

[41] Subsequent investigations by the Securities Commission revealed that some of the EDI Scheme funds had been misappropriated and paid to a company known as Susila Investment Limited, which was incorporated in New Zealand. The directors of this company at incorporation were Isaac Paul Ratnam's son and wife. It was also established that the bi-annual returns to investors were in fact funded through the capital invested by subsequent EDI Scheme investors-making the whole arrangement a Ponzi scheme. The EDI Scheme funds were also invested in leveraged structured products, which were not capital protected investments, contrary to representations given to investors.

[42] There was no evidence received at trial that suggested that Mr Khoo was privy to or even knew about the fraudulent conduct of Isaac Ratnam, Nicholas Chan or Joseph Lee.

The SC'S Case Against Valentine Khoo

[43] The pleaded case against Mr Khoo was initially cast widely and alleged that he together with RBTR and Al Alim had breached their duties in the setting up and marketing of the EDI Scheme. After trial, it became evident that Mr Khoo's involvement with the EDI Scheme only began after the board meeting of 29 May 2008, and that he had not been involved in the establishment of the EDI Scheme. In the after-trial submissions, counsel for the plaintiff limited the Commission's claims to Mr Khoo's purported failure to report various breaches regarding the EDI Scheme to the Commission in a timely manner. The Commission contended that his failure to do so contributed to the dissipation of USD1,430,303.82 from the Barclays account between 1 July and 21 November 2008, and sought an order for restitution from the court.

[44] The Fund Manager Guidelines imposes certain obligations on the holder of a fund manager's licence, including:

(i) understanding the risk appetite of a client before making recommendations or undertaking transactions for the client (para. 3.01(a) of the Fund Manager Guidelines);

(ii) avoiding any misrepresentation on any investment policy or investment recommendation (para. 3.01(d)(iv));

(iii) establishing and maintaining adequate risk assessment and management policies and procedures (para. 3.07(a));

A (iv) ensuring that risks assumed by clients are managed and monitored appropriately and that suitable action is taken to mitigate such risks (para. 3.07(b));

(v) ensuring that promotional materials given to clients are not misleading (para. 7.01(a));

B (vi) ensuring that withdrawals are not made from a client account except for lawful investments (para. 12.02(b)); and

(vii) appointing a custodian to be a trustee of clients' funds and investments (para. 12.03).

C **[45]** On the facts of this case, it was clear that there had been material breaches by RBTR of some or all of these requirements. The clients had invested into the EDI Scheme on the understanding and expectation that their investments would not only be capital protected but would also be invested with a AAA-rated bank. RBTR had failed to ensure that the D investments were held in the name of the custodian, which had directly facilitated the fraud by the fourth to eighth defendants. Had the investment accounts been held in the name of the custodian, it was likely that the funds could not have been dissipated in the way that it had been, because there would have been a check on all outgoings from the investment account.

E **[46]** As the holder of a fund manager's representative licence, Mr Khoo would have been under an obligation to ensure that RBTR complied with these requirements.

[47] In addition, the Fund Manager Guidelines imposed further obligations F on the board of directors of a licensed fund manager. These include implementing appropriate measures to prevent and detect abusive or inappropriate investment practices. It will be recalled that Mr Khoo was, at all material times, a member of the board of RBTR.

[48] The evidence received at trial established the following:

G (i) at the first board meeting on 29 May 2008, there were already concerns regarding the safety of investor's funds;

(ii) by 5 June 2008 (the date of the visit to Barclays Singapore), Mr Khoo will have known that EDI Scheme investments were not held in the H name of the custodian, contrary to the statutory requirements; and

(iii) as at 11 June 2008, there was sufficient facts before Mr Khoo to give him cause to believe that the perpetrators could potentially cause a total loss of the sums invested into the EDI Scheme.

I

[49] The Commission's position was that, as at 29 May 2008, there was USD1,430,511 standing to the credit in the EDI Scheme account held at Barclays Bank. Between 1 July and 21 November 2008, USD1,430,303.82 had been dissipated from this account, which the Commission contended could have been avoided had Mr Khoo reported the regulatory breaches and concerns to the Commission.

Analysis And Decision

[50] The first observation that may be made is that, as at the date of the 29 May 2008 board meeting, Mr Khoo was not yet the holder of a fund manager's representative licence. This meant that he would not have been subject to the requirements of the Licensing Handbook or the Fund Manager Guidelines, save in his capacity as a board member of RBTR. It will be recalled that he only received the licence on 4 July 2008.

[51] It has also to be remembered that, at the time, Mr Khoo had no knowledge that funds had been or was being embezzled by the sixth to eighth defendants, or of the Ponzi scheme that was being conducted. These facts only came to be established later, after the investigations were carried out by the Commission. While it was true that the board of RBTR (including Mr Khoo) had concerns on whether or not the EDI Scheme funds were secured, this was because there was no confirmation forthcoming from Barclays that the investments were capital protected and backed by a AAA-rated bank.

[52] I accepted Mr Khoo's testimony that he had discussed the subject of referring the non-compliance to the Securities Commission with En Al Alim, and that En Al Alim had told him that if they did that, the whole of the EDI Scheme funds might be lost-the implication being that the sixth to eighth defendants would go into hiding with the EDI Scheme funds. Mr Khoo's testimony was consistent with that of Mr Apparao Apana (PW6), a board member of RBTR who was partner of Tengku Azlina, Rao, Low & Associates, who testified that he had suggested that they take legal action to recover the EDI Scheme funds. Instead, the approach was taken to work with Locke Guaranty Trust/Locke Capital Investments to secure the return of funds that were maturing.

[53] I am of the view that they could not be faulted for having taken this decision.

[54] There was nothing in evidence before me to suggest that this approach was taken other than with the genuine and honest belief that it was in the best interests of the EDI Scheme investors to do so. Furthermore, the board of RBTR had been briefed, and it would appear, had been kept abreast of developments regarding efforts to secure the return of the EDI Scheme investments. In my considered judgment, the approach to secure the return

of the funds could not have been taken without the sanction of the board, whether express or tacit. It would thus be manifestly unfair to single out Mr Khoo to be liable for the dissipation of the USD1,430,303.82.

[55] It cannot be overemphasised that Mr Khoo had no involvement in the establishment or marketing of the EDI Scheme. The reason that he was appointed joint managing director was in an effort to resolve the EDI Scheme problem. That this was so clear from the context of the minutes of the board meetings of 29 May 2008 and 15 July 2008.

[56] As events turned out, the dividend and principal repayment obligations between May 2008 and January 2009 were substantially met, which lent credence and affirmed, in the minds of those at RBTR, that the negotiation approach was working.

[57] It has also to be remembered that it was Mr Khoo who had brought the matter to the attention of the Securities Commission. When it became clear that Locke Capital Investments would only be able to repay the principal for the months of February and March 2009 one year after their original maturity date, Mr Khoo reported the matter to the Securities Commission.

[58] Finally but no less significantly, there was in fact no express provision in the Licensing Handbook or in the Fund Manager Guidelines that required Mr Khoo to report any breach of investment terms or contravention of relevant statutory obligations to the Securities Commission, much less to do so at the earliest available opportunity. The Commission had not sought to argue that this was an implied statutory obligation. In my considered judgment, the absence of such an express statutory duty was fatal to the Commission's case against Mr Khoo.

[59] Even if there existed such a duty, and Mr Khoo was in breach of such duty, I would have declined to exercise the discretion of the court under s. 360(1)(M) of the CMSA to order that he be liable to make restitution of the USD1,430,303.82.

[60] Here was a person whose involvement in the EDI Scheme came about by virtue of circumstances only, and whose role was to attain a favourable resolution in favour of the EDI Scheme investors. The course of action he took was one of number that he might have taken, and there was every possibility that, had the matter been reported to the Securities Commission earlier, the culprits may have fled with the whole of the EDI Scheme funds, leaving a greater loss than that eventually suffered by the EDI Scheme investors. Furthermore, even if the decision was the wrong one to take, there was never any suggestion that the course taken was motivated by personal gain.

[61] Here was a man whose entire life lay in ruins because of his incidental involvement in the wretched affair. Mr Khoo had been a banker, having worked with institutions such as Standard Chartered Bank, Rabobank (as its deputy chief representative), and Affin Merchant Bank, over a period of 20 years. Because of the suit having been filed against him, he was unable to secure employment in the financial sector. At the time of trial, he was a Grab car driver to sustain a living.

[62] To cap it all off, it was Mr Khoo who had reported the matter to the Securities Commission. He was, for all practical purposes, the whistle-blower in this whole affair. To order restitution against him would neither be fair nor just and would not constitute a proper exercise of the judicial discretion under s. 360 of the CMSA.